

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Petition for Rulemaking)	CS Docket No. 99-250
To Amend 47 C.F.R. § 101.603)	
and Related Rules – To Allow the)	RM – 9257
use of 12 GHz OFS Frequencies)	
for the Delivery of Video)	
Programming Material)	

REQUEST FOR ACTION

In response to a suggestion from the staff of the Cable Services Bureau, OpTel, Inc. (“OpTel”) submits this pleading in the above-captioned proceeding to advise the Commission of the current status of OpTel’s reorganization under Chapter 11 of the U.S. Bankruptcy Code and of its intention to continue to provide competitive, multichannel video programming and high speed internet access services in its current markets, which include Denver, Phoenix, Chicago, Dallas, Houston, San Francisco and Miami.

In addition, in order to provide better service within these markets and to be able to expand more effectively into new markets, OpTel renews its call for the Commission to act in the above-referenced proceeding by allowing private cable operators and other multichannel video programming distributors (“MVPDs”) to use the frequencies in the 12 GHz band for the delivery of video programming.

BACKGROUND

OpTel began operations in April, 1993, with a strategy of consolidating the then-fragmented private cable television industry serving multiple dwelling units (“MDUs”). OpTel completed numerous acquisitions to become, in its belief, the nation’s largest provider of private cable television services to MDUs. OpTel also sought to become the

principal competitor in the MDU marketplace to the incumbent local exchange telephone carrier and aggressively expanded its telephone operations in many of its markets.

OpTel, however, was unable to achieve timely critical mass in its telecommunications related services and, therefore, was unable to achieve revenue levels necessary to fund its operational needs or to service its debt. OpTel filed for Chapter 11 bankruptcy protection in October, 1999. Since the filing of its Chapter 11 case, OpTel has made significant progress in preserving value and reorganizing its businesses. OpTel is now ready to exit Chapter 11 and, when it does so, OpTel will be fully recapitalized and focused exclusively on providing video and Internet access services primarily in the MDU marketplace in direct competition with incumbent MSOs.

Prior to its Chapter 11 filing, OpTel was an active participant in a number of FCC proceedings and has asked the FCC for regulatory changes to enhance competition and facilitate new services rollout. In this pleading, OpTel reaffirms its continuing interest in the opening of the 12 GHz band, which is of considerable importance to the success and survival of competitive MVPDs.

DISCUSSION

I. Allowing MVPD Competitors Access to the 12 GHz Band Will Increase Competition in the Cable Market.

A. The Cable Market Is Not Competitive.

As the Commission knows, meaningful competition does not exist in the cable television market. Of the 33,000 cable communities nationwide, the Commission reports that only 330 have effective competition.¹ As a result of this lack of competition,

¹ See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 16 FCC Rcd 6005 ¶ 138 (2001) (defining effective competition by “consumers having a choice of more than one MVPD”) [hereinafter “*Seventh Annual Report*”].

cable rates continue to rise faster than inflation.² Incongruously, however, a number of Commission rules continue unfairly to benefit franchised cable operators.

Accordingly, over three years ago, OpTel petitioned the Commission to allow licensees in the operational fixed microwave service (“OFS”) to use frequencies in the 12 GHz band for the delivery of video programming material.³ In that request, OpTel noted that the grant of authority for OFS to use 12 GHz frequencies would greatly increase the ability of wireless cable operators to become more competitive with franchised cable in more markets by allowing them to offer new and improved services. The Commission then issued a Notice of Proposed Rulemaking (“NPRM”) to address the proposed expanded use and spectrum sharing issues presented by the OpTel petition.⁴

As yet, the Commission has taken no action in this proceeding. The competitive imbalance between MSOs and competitive MVPDs, however, has worsened. Since OpTel filed its request, multichannel multipoint distribution service (“MMDS”) providers have seen a thirty percent drop in subscribers, from one million households in 1998 to 700,000 in 2000,⁵ major competitors like OpTel, SkyView, and Cable Plus have declared bankruptcy,⁶ and other companies, such as Bell South, have discontinued offering wireless cable services.⁷

B. Allowing MVPDs Access to 12 GHz Will Spur Competition.

The benefits derived from allowing competitive MVPDs access to the 12 GHz band will allow them the capability to offer more programming and a wider variety of services, and to serve more customers in different types of markets than is possible using 18 GHz frequencies.

² Id. at ¶ 9.

³ *Petition for Rulemaking Of OpTel, Inc.*, CS Docket No. 99-250 (filed April 1, 1998).

⁴ See *In the Matter of: Petition for Rulemaking To Amend Eligibility Requirements in Part 78 Regarding 12 GHz Cable Television Relay Service*, 14 FCC Rcd 11967 (1999).

⁵ See *Seventh Annual Report* at Appendix C.

⁶ Id. at ¶ 142.

As OpTel demonstrated in its petition and comments on the NPRM, the 18 GHz band suffers from technical limitations that raise the total cost of providing service to subscribers and thereby limits MVPDs' ability to compete. By comparison, 12 GHz microwave facilities provide much more efficient distribution in metropolitan areas and generally are more reliable and more readily available from a wider variety of manufacturers. Particularly since the 12 GHz technical rules need not be modified to accommodate other MVPD licensees, the 12 GHz band is a natural expansion band for MVPDs seeking to compete with franchised cable operators.

II. No Operational or Technical Considerations Justify Excluding MVPD Competitors From The 12 GHz Band.

A. The Addition of MVPDs Will Not Lead to Congestion in the 12 GHz Band.

Congestion should not be a consideration in the determination of whether MVPDs should be allowed to operate in the 12 GHz band. First, OpTel reasserts its belief that the Commission should use the more rigorous coordination procedures of Part 101, rather than those now found in Part 78, to help promote band sharing at 12 GHz. Second, more and more MSOs are opting away from using 12 GHz frequencies in favor of fiber optic cable, particularly in urban areas, the primary target markets for competitive MVPDs. Third, competitive MVPDs account for only 0.8 percent of the cable market and therefore, will not flood the band. Finally, even if such congestion did occur, the Commission has pointed out that, "congestion is not a reason to exclude a particular segment of a group of similarly situated candidates from access to the spectrum."⁸

B. Availability of Other Spectrum Is Irrelevant.

In the NPRM, the Commission asked whether other alternatives, such as 23 GHz, would obviate the need to provide non-franchised MVPDs with access to the 12 GHz

⁷ Id. at ¶ 10.

⁸ Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing the Use of the Frequencies in the 2.1 and 2.5 GHz Bands, 5 FCC Rcd 6410, 6423 (1990).

band.⁹ While spectrum above 21.2 GHz is available, those bands have neither the technical characteristics nor the bandwidth required to provide a video service that is competitive with—or even comparable to—franchised cable service.¹⁰ In fact, it was because of the limitations of these bands that the Commission opened the 18 GHz band for use by private cable systems.¹¹ Additionally, OpTel points out that franchised cable operators have access to frequencies above 21.2 GHz *and* 12 GHz. MVPDs that compete with such franchisees should be able to choose from among the same array of alternatives.

III. The Commission Should Make Its Microwave Eligibility Rules Competitively Neutral.

Competitive MVPDs should not be required to demonstrate that they have exhausted alternative bands of spectrum or that they have a certain minimum number of subscribers before being granted a 12 GHz license. Franchised cable operators are not required to make this showing and it makes little sense to hamper competition in the cable markets by burdening non-franchise operators with restrictions not placed on incumbents.

Moreover, the Commission should not relegate private cable systems to “secondary” status in the 12 GHz band. Such an action would result in the perverse outcome that incumbent operators could design their microwave systems to maximize inter-system interference to competitors, forcing the latter either to shut down or offer an unmarketable product. Similarly, no customer would subscribe to, and no investor would provide financing for, a cable system that could, at any time without any warning or any recourse, be forced to shut down its facilities because it has caused interference to its competitor.

⁹ See *NPRM* ¶ 16.

¹⁰ See 47 C.F.R. § 101.603.

¹¹ See *In re Amendment of Part 94 of the Commission’s Rules to Permit Private Video Distribution Systems of Video Entertainment Access to the 18 GHz Band*, 6 FCC Rcd 1270 (1991).

CONCLUSION

OpTel, and others stand ready to expand current services and to compete with franchised cable operators in new markets. To do so, however, potential competitors must be allowed to play on the same field as the incumbents. Opening the 12 GHz band to all MVPDs is a first, important step in that direction.

Respectfully submitted,

OPTEL, INC.

A handwritten signature in black ink that reads "Henry Goldberg". The signature is written in a cursive, flowing style.

Henry Goldberg

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